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**SWISS-GARDEN INTERNATIONAL
VACATION CLUB BHD**

v.

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SWISS MARKETING CORPORATION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[SUIT NO: D6-22-1529-2005]
26 OCTOBER 2010

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CONTRACT: *Repudiation - Marketing contract - Non-payment of marketing fees - Whether a fundamental breach that went to root of contract - Whether wrongful repudiation*

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CONTRACT: *Repudiation - Acceptance - Guilty party - Whether plaintiff or defendant - Election to accept or reject repudiation - Whether plaintiff's right of election*

CONTRACT: *Damages - Wrongful repudiation - Failure to exercise best endeavours - Misrepresentation - Lost of sales and good will*

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The plaintiff was a licensed timeshare operator and sold timeshare membership known as Swiss Garden International Vacation Club ('SGIVC Membership'). Pursuant to a Marketing Agreement entered into between the parties, the defendant was appointed as the sole and exclusive Marketing Agent for the plaintiff to sell and promote the SGIVC Membership to the public, for a period of five years, subject to all the terms and conditions contained therein. The plaintiff failed to pay the defendant their full marketing fees for the months of May and August 2005 and the defendant

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issued a repudiation notice to them. Subsequently, the defendant closed down all its sales offices and its marketers were taken over by the former CEO of the plaintiff under Sun Lifestyle Sdn Bhd.

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The plaintiff claimed that the repudiation by the defendant was wrongful and reserved its rights to sue for damages. It then filed this action against the defendant for breach of contract and consequential relief. The defendant, in turn, filed a counter-claim for various reliefs. There were four main issues that arose for determination before this court. The first was whether the defendant had wrongfully repudiated the Marketing Agreement, the

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second was whether the plaintiff committed other breaches under the Marketing Agreement that entitled the defendant to claim

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the Marketing Agreement that entitled the defendant to claim

damages against them, the third was the type of relief(s) that the plaintiff was entitled to seek against the defendant and the last was whether the defendant was entitled to its counter-claim. A

Held (allowing plaintiff's claim and defendant's counter-claim): B

- (1) There was no evidence, either directly or otherwise to infer that the plaintiff by its conduct evinced an intention not to continue paying marketing fees to the defendant be it in the past, present or future. To have held otherwise would have gone against the weight of evidence. There were also no evidence to show that the plaintiff had refused to make future payments and as such, it could not be said that the plaintiff failed to perform its obligations in its entirety. The plaintiff's failure to pay the marketing fees was not a breach that went to the root of the contract nor was it a fundamental breach that entitled the defendant to repudiate the agreement. Therefore, the repudiation was wrongful. (para 20) C D
- (2) The plaintiff did not breach cl. 3.1.2 of the Marketing Agreement as there was no other agent appointed to sell SGIVC. Swiss Breakaway was a short term product and the persons appointed to sell it were the plaintiff's own personnel. Thus again there was no fundamental breach committed by the plaintiff which had entitled the defendant to repudiate the agreement. On the second issue, the defendant had again wrongfully repudiated the agreement. (para 22) E F
- (3) The plaintiff had accepted the repudiation and termination of the agreement. Then the defendant *vide* their 22 August 2005 notice, "accepted the plaintiff's repudiation". Each party could not accept the repudiation. Since it was the defendant that had wrongfully repudiated the agreement, it was not correct for it to have accepted its own repudiation. As the guilty party, the defendant had no right of election. That right belonged to the plaintiff as the innocent party. Consequently the plaintiff was entitled to damages. (paras 24) G H
- (4) The defendant failed to exercise its best endeavors to sell and promote the timeshare membership and their conduct constituted a breach under cl. 4.1.1 of the agreement. Also, there was overwhelming evidence to support a finding that the defendant's marketers misrepresented SGIVC members and that such conduct clearly breached cll. 4.4.1 and 4.6.1 of the I

- A agreement. Finally, the evidence adduced by the plaintiff on
DW10's involvement in Sun Lifestyle Sdn Bhd was not
sufficient to conclude that the defendant did marketing for
others. In any event, that issue was not relevant as the
defendant evinced an intention not to act as the plaintiff's
B agent anymore and it followed that the defendant had to work
for someone else to earn a living. (paras 25, 28, 33 & 34)
- (5) On loss of sales, the average sales of the plaintiff per month,
as submitted, would be accepted and the total losses for two
C months would be accepted as RM5,321,706. On loss of sales
materials and equipment, there was sufficient documentary
evidence to support this claim, hence it would be allowed. On
general damages, the fact that there was an allegation of
misrepresentation on the part of the plaintiff was sufficient to
D tarnish its reputation and goodwill - more so when the
President of the Consumer Tribunal made a finding that
misrepresentation had occurred. Further the plaintiff had a
stronger footing to claim for loss of goodwill as the agreement
expressly prohibited the defendant from misrepresenting and
they had breached it. Misrepresentation had a direct impact
E on the plaintiff's goodwill and they should thus be awarded
damages. (paras 36 & 37)
- (6) No evidence was adduced to support the figure
F RM21,040,518.31 stated on marketing fees in the defendant's
counter-claim. The original figure was allowed to be orally
amended to RM28,396,994. The amendment did not mean
that the defendant was entitled to it and it would still have
to prove the said figure in court. However, as O. 20 r. 9
Rules of the High Court 1980 was not complied with by the
G defendant, the original figure claimed had remained unchanged.
(paras 38 & 39)
- (7) The payment of fees was subject to the plaintiff receiving
H payment from the purchasers. The parties dealt with marketing
fees since 2001 without any problem. Thus, they fully
understood the formula for its calculation. Taking into account
the amount claimed, the voluminous documents and the
accounting process involved, in fairness to both parties, a
qualified accountant would be appointed to calculate the
I actual marketing fees due and owing to the defendant. (paras
41 & 42)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA (**refd**)

Attorney General of Belize v. Belize Telecom Limited [2009] UKPC 11 (**refd**)

Ban Hong Joo Mines Ltd v. Chen & Yap Ltd [1968] 1 LNS 13 FC (**refd**)

Bank of Credit and Commerce International SA v. Munawar Ali [2000] 2 WLR 735 (**refd**)

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC (**refd**)

CCA Holdings Ltd v. Palm Resort Bhd [1998] 4 CLJ 440 HC (**refd**)

Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA (**refd**)

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 (**refd**)

LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA (**refd**)

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 3 CLJ 310 CA (**refd**)

Rhodia International Holdings & Anor v. Huntsman International LLC [2007] 2 All ER 577 (**refd**)

Sheffield District Railway Co v. Great Central Railway Co [1911] 27 TLR 451 (**refd**)

Sik Hong Photo Sdn Bhd v. Ch'ng Beng Choo [2010] 5 CLJ 427 CA (**refd**)

Sri Kelangkota - Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA (**refd**)

Subramaniam v. PP [1956] 1 LNS 115 PC (**refd**)

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC (**refd**)

Terrell v. Mabie Todd & Co [1952] 2 TLR 574 (**refd**)

Travista Development Pte Ltd v. Tan Kim Swee Augustine & Ors [2008] 2 SLR 474 (**refd**)

Legislation referred to:

Contracts Act 1950, ss. 40, 56(1)

Evidence Act 1950, s. 90A(1)

Rules of the High Court 1980, O. 20 r. 9

For the plaintiff - Andrew Chiew Ean Vooi (Ivan Ong with him); M/s Lee Hishamuddin Allen & Gledhill

For the defendant - LA Gomez; M/s LA Gomez, Meor Shaazizi & Assocs

Reported by Sharmini Pillai

A JUDGMENT

Hadhariah Syed Ismail JC:

Facts Of The Case

- B** [1] The plaintiff is a licensed timeshare operator and sells timeshare membership. The plaintiff's timeshare membership is known as Swiss Garden International Vacation Club (SGIVC Membership). Pursuant to a marketing agreement dated 2 July 2001 entered into between the parties, the defendant was
- C** appointed as the plaintiff's sole and exclusive marketing agent to promote and sell SGIVC Membership to the public at large. The appointment is effective for a period of five years. However, provision was made that either party may terminate the agreement by giving two months prior notice.
- D** [2] Under the terms of the said agreement, the defendant undertook a number of obligations, of which the following are relevant to this suit:
- E** (i) to act as the plaintiff's exclusive marketing agent for a period of five years.
- (ii) shall diligently and faithfully serve the plaintiff and shall use its best endeavour to promote the sale of the plaintiff's timeshare membership.
- F** (iii) shall not do anything that may prevent the sale or interfere with the development of the sale of SGIVC Membership.
- (iv) shall not make any representation other than those under the trust deed, prospectus, membership agreement and the Rules
- G** and Regulations relating to the plaintiff's timeshare membership.
- H** [3] For the sales done by the defendant, the plaintiff undertook to pay marketing fees at 40% of the membership fees paid by the purchasers or a sum equivalent to 60% if membership fees are paid by instalments. This payment is to be made on or before the 15th day of each month.
- I** [4] Due to drop in sales and poor collections, the plaintiff failed to pay to the defendant their full marketing fees for the month of May 2005 to August 2005. Only small payments were made in June and July 2005, a fact which was not denied by the plaintiff. This prompted the defendant, through its Managing Director, one

Miss Lavinia Lim (DW10) to issue a repudiation notice dated 22 August 2005 to the plaintiff, intimating their intention to terminate the agreement on the ground of fundamental breach committed by the plaintiff in failing to pay the marketing fees. On 23 August 2005, the defendant closed down all its sales offices. On 24 August 2005, all the defendant's marketers were taken over by the former CEO of the plaintiff under the Sun Lifestyle Sdn Bhd. In reply, the plaintiff wrote a letter dated 6 September 2005 to the defendant, informing they disagree that non-payment of marketing fees as giving right to the defendant to repudiate the agreement and such repudiation is wrongful. Nevertheless, since it is obvious to the plaintiff that the defendant no longer intend to act as their marketing agent, they accepted the repudiation, terminated the agreement and reserved its right to sue for damages. On 19 October 2005, the plaintiff filed this action against the defendant for breach of contract and its consequential reliefs. On 29 November 2005, the defendant filed a counter-claim against the plaintiff for various reliefs.

[5] From the pleadings, it is obvious that each party blamed the other for the breach of the contract. In simple language, each party say they are innocent. At this juncture, I think it is appropriate for me to state that in an action for breach of contract it is the court that determines who is the innocent party and who is the guilty party, see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 at p. 281. Essentially, this court was asked to determine who is the innocent party, who is the guilty party and what are the rights of an innocent party where there is a breach of contract. I shall start with stating the parties claim.

Plaintiff's Claim

[6] The reliefs prayed for in the statement of claim are:

- (a) damages for the loss of sales of the plaintiff's product due to the defendant's failure to give two months notice as required under the agreement amounting to RM5,231,706 less the commission payable to the defendant;
- (b) damages for the loss of use of the sales materials and equipment amounting to RM48,638.16;
- (c) compensation for the loss of sale of the plaintiff's products at the time when the defendant was acting for a competitor company;

- A (d) damages for the misrepresentation of the plaintiff; and
(e) damages to be assessed by the court for the loss of goodwill of the plaintiff's trade names as a result of the defendant's misrepresentation.

B **Defendant's Counter-claim**

[7] The defendant counter-claimed against the plaintiff for:

- C (a) the sum of RM21,091,398.31 comprising the marketing fees due;
(b) alternatively, an account setting out the breakdown of the marketing fees payable pursuant to cls. 5.1.1 and 5.1.2 of the agreement and judgment upon the sum found due on taking the said account;
D (c) an account setting out all the "beback monies" and judgment of 60 % upon the sum found due on the said account;
(d) the sum of RM90,995.32 being the electricity and rental arrears;
E (e) general damages;
(f) interest; and
F (g) costs.

The Issues

[8] The issues before the court are:

- G (a) Whether the defendant had wrongfully repudiated the marketing agreement?
(b) Whether the plaintiff committed other breaches under the marketing agreement which entitles the defendant to claim damages against the plaintiff?
H (c) What are the reliefs which the plaintiff is entitled to seek against the defendant.
(d) Whether the defendant is entitled to their counter-claim?

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Law On Repudiation Of Contract

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[9] The word repudiate in its true sense means ‘putting an end’. When used in relation to a contract, it simply means putting an end to a contract. Under the law, there must be a fundamental breach before a contract can be put to an end. This doctrine of repudiation is explained by His Lordship Gopal Sri Ram (FCJ) in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269. Under held [13], His Lordship states:

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The doctrine of repudiation is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the Contract as at an end and sue for damages. The rationale is that the Primary obligation to perform the promise made is substituted with a Secondary obligation to compensate the promisee for the breach. See, *Moschi v. Lep Air Services Ltd* [1973] AC 331. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee - the innocent party - is a fact to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible. See, *Sargent v ASL Developments Ltd* [1974] 131 CLR 634,655. But it is the essence of the doctrine of repudiation that the breach must go to the root of the contract. See, *Mayson v. Clouet & Anor* [1924] AC 980; *Bowes v. Chaleyer* [1923] 32 CLR 159; *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha* [1962] 2 QB 26. In the absence of an express refusal to perform, the test is whether the conduct of the contract-breaker is such that a reasonable person would say of it that he has breached his promise in its entirety. See, *Freeth v. Burr* [1874] LR 9 CP 208; *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1983] 1 CLJ 541; [1985] CLJ (Rep) 266.

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[10] On the same page, His Lordship further says:

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety.

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[11] *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 is a case involving a sale and purchase agreement of a shop lot. The appellant/developer did construct the unit purchased by the respondent/purchaser, but did not complete it on the due

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- A date. There was delay in delivery of vacant possession. The respondent/purchaser sued the appellant/developer, claiming the agreement had been rescinded, for refund of the monies paid and damages. Both the High Court and Court of Appeal found in favour of the respondent/purchaser. On appeal by the appellant/
- B developer, the Federal Court held on the facts there was no total failure of consideration and the purchaser's remedy is payment of liquidated damages. The termination of the agreement was therefore wrongful. For cases of similar nature; see *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434; *Sik Hong Photo Sdn Bhd v. Ch'ng Beng Choo* [2010] 5 CLJ 427.
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- [12] An example of a total failure of consideration can be found in *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666, a case of a building contract where the
- D developer never constructed the house and the High Court declared the parties were no longer bound by the agreement and ordered a refund of the monies paid. For an example of a fundamental breach, see *Ban Hong Joo Mines Ltd v. Chen & Yap Ltd* [1968] 1 LNS 13.
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[13] The proposition of law with regard to repudiation of contract that can be deduced from the Federal Court's decision are these:

- F (a) The right to rescind a contract by way of termination can only arise when there has been a total failure of consideration or a fundamental breach or breach that goes to the root of the contract.
- G (b) Fundamental breach happens when the party in default failed to perform his promise in its entirety.
- (c) If the breach is not a fundamental breach, the aggrieved party cannot terminate the contract, but is entitled to sue for
- H damages.
- (d) If the breach is not a fundamental breach and the aggrieved party repudiates the contract, the repudiation is wrongful. The innocent party then has an election whether to accept or reject the repudiation. If the innocent party accepts the
- I repudiation, he or she can terminate the contract and sue for damages. If the innocent party rejects the repudiation, he or she is entitled to treat the contract as still subsisting.

Whether The Defendant Had Wrongfully Repudiated The Agreement? A

[14] To begin with, the repudiation notice dated 22 August 2005 (P13) issued by DW10 to the plaintiff read:

Your failure to pay the outstanding commissions is a breach of clause 5.1.2 of the Marketing Agreement between us. This is a material and fundamental breach of the Marketing Agreement and amounts to an act of repudiation of the Marketing Agreement on your part. Given the seriousness of the breach and taking into account the impact of the breach on our financial circumstances, we have no alternative but to accept your repudiation and treat the Marketing Agreement as at an end.

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[15] There seems to be disagreement between the parties as the true nature of P13. The defendant say it was a repudiation notice. The plaintiff say it was a termination notice. As I understand the law, it matters not the label given by the parties but the conduct and intention of the parties that the court will examine.

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[16] From the reading of P13, it is obvious that the sole reason or main complaint of the defendant which led to the issuance of the notice was the non-payment of outstanding marketing fees. Since it was the defendant who asserted there was an occasion of fundamental breach on the part of the plaintiff and it was the defendant as well who evinced an intention to repudiate the agreement, it is incumbent upon the court to examine whether there was indeed a fundamental breach committed by the plaintiff. Now, taking the advice of His Lordship Gopal Sri Ram (FCJ) in *M-Concept's* case, in deciding whether there was in a given case total failure of consideration, the court must first interpret the promise as a whole. Meaning, in this case, I had to interpret the marketing agreement. In doing so, I had to follow these guidelines:

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(a) A court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction.

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(b) The factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties.

(c) The interpreting court must disregard any part of the background that is declaratory of subjective intent only.

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(d) The court should adopt an objective approach when interpreting a private contract.

- A [17] Authorities for guideline to interpretation of contracts can be found in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98; *Bank of Credit and Commerce International SA v Munawar Ali* [2000] 2 WLR 735. The most recent statement of the guideline to interpretation of contracts is
- B to be found in *Attorney General of Belize v. Belize Telecom Limited* [2009] UKPC 11, where Lord Hoffmann said:

- C The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which
- D would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the
- E author of the instrument.

- [18] Having read the marketing agreement as a whole, neither can I find a term which says failure to pay the marketing fees on or before the 15th day of the month entitled the defendant to
- F repudiate the agreement nor was there a term which says time is of the essence of the contract. In fact the truth is to the contrary. Clause 7.1.3 says failure by either party to comply with any of the terms shall enable the other party to insist on strict adherence to the same. In view of the exclusivity of the
- G defendant's position to the plaintiff, the specific product to be sold and the period of appointment, I am more inclined to believe it was not the intention of the parties that for every trivial problem that arose, the innocent party can terminate the agreement as of right or whenever they do not feel like proceeding with the
- H contract. The latter seems to be the position taken by the defendant here. Imagine the hardship caused to the plaintiff when their sole marketing agent terminated the contract abruptly. They cannot appoint a new marketing agent overnight. Of course the defendant will argue that non-payment of commission is not trivial
- I in nature. But the law says the breach must be fundamental or one that goes to the root of the contract before there can be a termination. That is why my next task is to determine whether

these non-payment of marketing fees were a fundamental breach of the agreement or not. In doing so, again I am guided by *M-Concept's* case in that I must read s. 40 of the Contracts Act 1950 together with 56(1) of the same Act. A

Section 40 provides as follows: B

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. C

Section 56(1) provides: D

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract. E

[19] It is pertinent to note that in all the cases on breach of contract referred to earlier, emphasis is given to the key word that the non-defaulter's right to repudiate a contract accrues only when the defaulter refused to perform the whole of the promise. In the case before me, the evidence adduced thus far only established the plaintiff made late payment and partial payment. Clearly this act of the plaintiff is distinguishable from a wilful refusal to make payment. F

[20] To the contrary, the plaintiff did pay full marketing fees to the defendant from 2001 to 2005. Only from May to August 2005, was the plaintiff not able to pay the full marketing fees. Partial and late payment cannot be equated with wilful refusal to pay. So this was not a case of where no payments were made at all. The plaintiff's conduct of continuing to make payments to the defendant, even though partially and late indicated they tried to fulfill their obligation. There is simply no evidence, direct or indirect which enable this court to infer the plaintiff by their conduct had evinced an intention not to continue paying marketing fees to the defendant be it in the past, present or future. To hold it otherwise would go against the weight of evidence. I hasten to add here that it is impossible for the plaintiff to refuse to pay marketing fees because they have a fixed term contract with the defendant and their income depends on the sales carried out by the defendant. Marketing fees are an incentive that will motivate the defendant to do sales. There was also no evidence that the G H I

- A plaintiff refused to make future payments. In that sense it cannot be said that the plaintiff has failed to perform its obligation in its entirety or disabled itself from performing its part of the bargain. So, it is not a case of the plaintiff totally failing and refusing to pay the marketing fees. On the facts and circumstances of this case, I hold that the plaintiff's failure to pay the marketing fees is not a breach that went to the root of the contract or a fundamental breach which entitled the defendant to repudiate the agreement and that the repudiation is wrongful. An example of a case where failure to make payment was not a breach that went to the root of the contract can be found in *Sri Kelangkota - Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779.

- [21] Next, I shall consider the 2nd alleged breach committed by the plaintiff. The breach as pleaded by the defendant is "the plaintiff openly advertising for staff on 11 June 2005 and 30 July 2005 with timeshare experience to fill vacancies as Swiss Counsellors and hence, breached cl. 3.1.2 of the marketing agreement". But, in advancing its case on this ground, the defendant *inter alia* submit that as a result of the plaintiff's breach, the defendant was unable to function as a marketing company" and "by doing everything in their powers to put obstacles in the defendant's way so that they would breach the marketing agreement ... ". Clearly submission "defendant were unable to function as a marketing company" is a departure from the pleading. There is a material difference between what is pleaded and the submission. The submission seems to imply that the plaintiff purposely put obstacles to get rid of the defendant. The law on pleadings are settled. Parties are bound by the pleadings. The court also is duty bound to decide a case based on the pleaded case only; see *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310; *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639. On the law and pleaded case, I shall not consider the defendant's submission on the defendant's inability to function as a marketing agent.

- [22] With regard to the 2nd breach, evidence led indicated that the plaintiff's personnel, PW4 was invited to set up a sales team, to design and market a short term product known as "Swiss Breakaway". To this end, PW4 joined Swiss Garden Rewards Sdn Bhd (SGR). Swiss Breakaway was a different product from SGIVC timeshare membership. The advertisement to employ Swiss

Counsellors was published by SGR on 11 June 2005 and 30 July 2005. It is important to note that the advertisement states that SGR was looking for people to sell a new lifestyle product and not SGIVC timeshare product. Even though the defendant acknowledged the advertisement is for SGR product, they were informed that the plaintiff is planning to sell timeshare. But as it turns out, PW4 and his team had to sell SGIVC timeshare membership after the defendant left the plaintiff and this is also because the plaintiff did not have a marketing agent. On a true construction of cl. 3.1.2 of the agreement, it only prohibits the plaintiff from appointing another agent to sell SGIVC during the tenure of the defendant's appointment. This is not the case here. The plaintiff did not breach cl. 3.1.2 because there was no other agent appointed to sell SGIVC. The product is different and the person employed is the plaintiff's own personnel. In the circumstances, I find there is no fundamental breach committed by the plaintiff to entitle the defendant to repudiate the agreement. So, on the 2nd alleged breach also, the defendant had wrongly repudiated the agreement. That being the case, naturally the next question to ask is how can the defendant terminate the agreement lawfully? The answer is to be found in the agreement itself. Pursuant to cl. 6.1, the defendant had to give 60 days prior notice in writing to the plaintiff. This they failed to do. The defendant had breached cl. 6.1.

Who Is The Guilty Party

[23] Having heard and seen witnesses as well as after careful analysis of all the evidence, I would say the guilty party in this case is the defendant. I say so for the following reasons:

- (a) They closed down all their sales offices immediately upon issuing a repudiation notice to the plaintiff.
- (b) They disbanded their own marketers.
- (c) They abandoned their role as the plaintiff's exclusive marketing agent before the appointment came to an end.
- (d) They wrongfully repudiated the agreement.
- (e) They failed to comply with cl. 6.1 of the agreement.

A Plaintiff's Election

[24] As mentioned earlier when there is occasion of wrongful repudiation, the innocent party had an election whether to accept or reject the repudiation. In this case, the plaintiff accepted the repudiation and terminated the agreement. But there is one thing I wish to clarify. It is this. The defendant, in their 22 August 2005 notice also mentioned they "accepted the plaintiff's repudiation". Each party cannot accept the repudiation. Since I have made a finding that the defendant was the one who had wrongfully repudiated the agreement, it is not correct for the defendant to say they accept their own repudiation. As the guilty party, the defendant had no right to election. That right belongs to the innocent party, the plaintiff. Consequent to the termination of the agreement, the plaintiff is entitled to claim for damages which will be dealt later. This is because the plaintiff had raised the issue of other breaches committed by the defendant and these breaches had a direct impact on the damages claimed.

Other Breaches By The Defendant

E [25] In their written submission, the plaintiff alleged the breaches occurred in the following manner:

- (i) defendant failed to use their best endeavours to sell and promote the sale of timeshare membership of the plaintiff;
- F (ii) defendant's sales agents misrepresented to customers when conducting sales; and
- (iii) defendant stopped marketing for the plaintiff and mobilized its employees to market for another company.

G Best Endeavours

[26] To understand what is meant by 'best endeavours', I was referred to *Travista Development Pte Ltd v. Tan Kim Swee Augustine & Ors* [2008] 2 SLR 474; *Terrell v. Mabie Todd & Co* [1952] 2 TLR 574; *Sheffield District Railway Co v. Great Central Railway Co* [1911] 27 TLR 451; *Rhodia International Holdings & Anor v. Huntsman International LLC* [2007] 2 All ER 577. In *Travista Development Pte Ltd v Tan Kim Swee Augustine & Ors* [2008] 2 SLR 474, the Singapore Court of Appeal states the test for best endeavours as follows:

The test to determine whether a party has exercised its best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests.

While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor “doing everything reasonable in good faith with a view to obtaining the required result within the time allowed” (per Kang J in *Ong Khim Heng Danial* at [42]. The test also involves a question of fact. As stated by Choo Han Teck J in *Group Eksklusiv Pte Ltd v. Diethelm Singapore Pte Ltd* [2003] 4 SLR 582 at [11]: The facts that are relevant in such cases must include the nature of the approval sought, the practice, if any, of those in the trade concerned, the availability of an appeal process, evidence of futility of further efforts and so on.

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[27] Before I talk about best endeavours, let me explain the features of timeshare memberships as set out in the prospectus and timeshare membership agreements. These are:

- (i) SGIVC Memberships confers on a member the right to use and enjoy specific Swiss Garden Resorts and Hotels with other members for a specific period of time.
- (ii) the plaintiff may, from time to time, enter into reciprocal arrangement with Domestic or International Resorts for its members to use affiliated resorts. However, such arrangements are not perpetual. The plaintiff can change its affiliation without any liability to the members.

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[28] With those features and the product to be sold to public at large, the marketers must have the necessary knowledge on the products, its concept as well as the rules and regulations with regard to SGIVC so that the prospective members know their rights and limitations. In fact one of the defendant’s obligation under the agreement is to provide training. Through their witnesses, PW2 and PW3, plaintiff sought to show that there was no training given on the terms and conditions of the membership or the rules and regulations on how to use the memberships. In other words the training was focused on closing the sales so that the defendant can earn its marketing fee. Although the defendant’s witness, DW8 claimed there was a training manual which will show that the staff were trained on how to properly sell timeshare, the manual was never produced. In the circumstances, it is reasonable to infer such a manual does not exist. Assuming there was training given, the training is confined to product benefits as confirmed by DW10. Of importance is there was no training on the legal implications if sales personnel misrepresented to customers. If this specific training is given, there would not have

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A been many complaints by the customers relating to misrepresentations. I agree with the plaintiff's contention that the training provided by the defendant fall short of the reasonable man standard expected of them, especially on the point the marketers are not trained to act in the best interest of the plaintiff's
B company. For lacking in training and the lackadaisical attitude of the defendant, I do not hesitate to hold that the defendant failed to exercise its best endeavours to sell and promote the timeshare membership and their conduct constitute a breach of cl. 4.1.1 of the agreement.

C **Misrepresentations**

[29] Plaintiff relied on the following to prove the defendant's marketers had resorted to a misleading sales tactic to entice prospective customers.

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- (i) Oral testimonies of defendant's former employees, PW1, PW2 and PW3.
 - (ii) Written complaints received against PW1, PW2 and PW3.
 - E (iii) Written complaints from the customers to the plaintiff after the defendant left.
 - (iv) Complaint made by Tan Kian Kheong to the Consumer Tribunal.
 - F (v) Termination Reports (ID25), Cancellation Reports and Gross Sales Reports (ID29).

G [30] PW1, PW2 and PW3 told the court how they managed to convince prospective customers by giving inaccurate, untrue and misleading information. They adopted these tactics:

- (a) assuring customers that bookings will be guaranteed;
- (b) preferred room rates for hotels in Malaysia and overseas which are not owned by the plaintiff;
- H (c) the plaintiff promised to buy back the membership if the members are no longer interested;
- (d) misleading information on the utilization of their membership entitlements; and
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(e) use of different names when dealing with customers. This applies to Lavinia Lim (DW10) and her mother, Datin Shirley Ooi, who referred themselves as Natasha and Nicole respectively. A

[31] To add salt to injury, after convincing the prospective customers to sign the membership agreement and declaration forms relating to SGIVC Membership, copies of the rules and regulations relating to SGIVC Membership, prospectus and membership agreement were not given to the customer. Although it is hard to believe it happens in every case, but the probability of such practice being adopted and condoned by the defendant cannot be ruled out. I am more inclined to believe such practice does exist because the more the sales are done by the marketers, the more marketing fees they will earn. The probability of this malpractice to happen is higher when it was proved there were complaints made by the members against PW1, PW2 and PW3 and the same were admitted by these witnesses. In addition, there were also in evidence that the plaintiff received written complaints from its members about misrepresentations made by the defendant. These complaints were marked as ID1, 2, 3, 7, 14, 15, 16, 17, 18, 19, 21, 50, 51, 142 and 174. The makers of these documents were not called. Plaintiff submit these documents are not hearsay and admissible because they are relevant to the issue of whether the defendant prohibit its staff from misrepresenting customers. In support, plaintiff referred to *Subramaniam v. PP* [1956] 1 LNS 115, wherein Privy Council held: B C D E F

It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. G

[32] Applying the above principle to the facts of this case, I chose to admit these IDs in evidence solely for the purpose to show that there were complaints by the plaintiff's customers of misrepresentation made by the defendant's marketers and not for the truth of the complaints. My reasons for doing so: first, if the marketers followed the rules and regulations set out by the plaintiff and treated the customers in like manner that they want others to treat them, there would not have been a complaint or the complaint would be negligible, not substantial. Second, these IDs would lend support to the oral evidence of PW1 - PW3. To further support the existence of the complaints, the plaintiff H I

- A produced the judgment by the Consumer Tribunal in respect of a complaint made by Tan Kian Kheong, wherein the President found DW8 had misrepresented to Tan. Finally, the Termination Reports (ID25), Cancellation Reports, Gross Sales Reports (ID29) which were computer-generated documents show the sales
- B recorded and membership terminated as a result of misrepresentation. PW6 and PW7 gave evidence on how these documents were produced. Certificate under s. 90A Evidence Act 1950 also was issued. In the circumstances, the plaintiff urged this court to admit these IDs in evidence. Authority on admissibility of
- C computer-generated documents has been succinctly stated in *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6; the gist of it is this: the party intended to produce computer-generated documents must prove such documents were produced by computer and that the computer produced them in the course of
- D its ordinary business. A certificate under s. 90A is not mandatory in every case. But such certificate was issued in this case. The crux of the matter is: does this court accept PW6 and PW7's evidence that these IDs were computer generated? The answer is yes. There is no reason for me not to believe these IDs were
- E computer generated and produced by a computer in the course of its ordinary business. In the circumstances, the plaintiff has proved the requirements of s. 90A(1) and these IDs shall be marked as exhibits and admitted in evidence.
- F [33] To conclude, all I need to say is there is overwhelming evidence to support a finding that the defendant's marketers had misrepresented SGIVC Members and such conduct clearly breached cl. 4.4.1 and 4.6.1 of the agreement.
- G **Marketing For Others**
- H [34] Under this head of breach, plaintiff sought to show that prior to the repudiation notice of 22 August 2005, the defendant had taken steps to stop marketing for the plaintiff. This is obvious when the defendant closed down all its sales offices on 23 August
- I 2005. Then all the defendant's marketers were taken in by Sun Lifestyle Sdn Bhd. The plaintiff's complaint is this. It is not possible for the defendant's marketers to be transferred to another company overnight without prior planning. A newspaper article also was produced to show DW10 was involved in Sun Lifestyle Sdn Bhd. On the balance of probability, I find the evidence adduced by the plaintiff on DW10's involvement in Sun Lifestyle is not sufficient for me to conclude whether the defendant did

marketing for others. I was of the view that this issue is not relevant because the defendant had evinced an intention not to act as the plaintiff's agent anymore. That being the case, of course the defendant had to work for someone else to earn a living.

[35] For the reasons mentioned above, it is obvious that in addition to the earlier breaches, the defendant has committed other breaches as well.

[36] Now, I shall deal with the reliefs sought by the plaintiff.

(i) Loss of sales

In their amended statement of claim, the plaintiff has pleaded that the average monthly sales of timeshare membership from July 2002 to June 2005 is RM2,615,853.00. Plaintiff contend this figure had taken into account the 40% commission payable to the defendant. Now, had the defendant given the two months notice, the plaintiff would not have had loss in sales for two months. This is a natural and direct consequential loss suffered by the plaintiff because they did not have a marketing agent after the defendant left. This is also a foreseeable loss. So, based on the average sales of RM2,615,853 per month, for two months, the total loss would be RM5,321,706.

The defendant disputed the amount claimed on two grounds. First, the figures was premised on a gross membership sales. Second, the plaintiff could not have suffered losses because Swiss Garden Reward Sdn Bhd (SGR) carried on sales for the plaintiff. My answer is this. All along during the trial, I had the impression that parties had no issue on figure RM2,615,853 being the average sales per month. Of course the defendant would want to show they had brought in high sales to earn more marketing fees. I therefore accept RM2,615,853 as the average sales per month. With regard to the argument SGR carried on sales for the plaintiff, I cannot ignore evidence adduced by the plaintiff's witnesses that SGR only started selling SGIVC for the plaintiff in October 2005. In the absence of any evidence to the contrary, this court is left with the unrebutted evidence of SGR that it started selling SGIVC in October 2005 and this fact must be accepted as true. Hence, I allowed this amount of RM5,321,706.

A (ii) Loss of sales materials and equipments

The amount claimed under this head of damages is RM48,638.16. This claim is made based on the premise that these sales materials and equipments were advances by the plaintiff. So, it must follow that when the defendant repudiated the agreement, the plaintiff demanded for the return of the sales materials and equipments. The request was ignored by the defendant. Details of the claim have been set out in Annexure B to the statement of claim. Invoices and payment vouchers were produced to support the claim. Since there was ample evidence adduced, I allowed this claim.

(iii) General damages

D Under this heading, the plaintiff claimed for damages to be assessed in respect of:

- (a) loss and damage suffered as a result of the misrepresentations made by the defendant's marketing agents and failure to use best endeavours in selling the timeshare products; and
- E (b) loss of goodwill.

[37] The claim is made on the premise that the defendant had undertaken an obligation not to mislead and misrepresent their prospective customers. Yet, the defendant condoned the act of their marketers to misrepresent the customers. So much so, there was a complaint made against the plaintiff in the Consumer Tribunal. When there was a claim made against the plaintiff by its own customer alleging he or she has been misrepresented by the plaintiff, the plaintiff's reputation has been injured already. Defendant may argue that it is only a one-off incident proven by the plaintiff. But it is this court's view that the court is not concerned with how many claims against the plaintiff are filed in the Consumer Tribunal. The fact that there was an allegation of misrepresentation on the part of the plaintiff is sufficient enough to tarnish the plaintiff's goodwill and name. What more when the President of the Tribunal believed that there was misrepresentation. Damage had already been done to the plaintiff. An example of a case where claim for loss of goodwill was allowed on the ground there was mismanagement of the plaintiff's business can be found in *CCA Holdings Ltd v. Palm Resort Bhd* [1998] 4 CLJ 440. In addition to that, I am of the view that the plaintiff in this case had a stronger footing to claim for loss of goodwill because the

agreement had expressly prohibited the defendant from misrepresenting and they have breached that express prohibition. Misrepresentation had a direct impact on the plaintiff's goodwill. The plaintiff should be awarded with damages. In the circumstances, I make an order that general damages are to be assessed by the Senior Assistant Registrar.

[38] Now, I shall deal with the defendant's counter-claim.

(a) Marketing Fees

In the amended counter-claim, the amount claimed is RM21,040,518.31. No evidence whatsoever was adduced to support this figure. As the trial proceeded, the defendant applied orally to amend the claim to RM28,396,994. This new figure is based on the gross membership sales (exh. P28) prepared and produced by the plaintiff's witness, PW6. Plaintiff raised three issues. First, this amendment was allowed without inviting submission from the plaintiff. Second, after amendment was allowed, the defendant did not file any re-amended counter-claim. Thus, the defendant's claim remains unamended. Third, defendant cannot rely on P28 because the figure is not correct. I will answer the first issue. It is settled law that amendments can be made formally or orally at any stage of the proceeding. Here the amendments relates to figures only. Rather than hearing lengthy arguments which will take so much of the court's time, to avoid delay and interruption to the proceedings, I chose to allow the amendment because all it takes is a few seconds to dispose of the application. Once amendment is allowed, it does not mean that the defendant is entitled to the RM28,396,994. There seems to be a confusion between "entitled to claim" and "entitled to the amount". Defendant is entitled to claim RM28,396,994. But whether they are entitled to the amount depends on whether they are able to prove their entitlement to it because the law requires strict proof. At the end of the day, it is not the figure alone that matters but whether one is able to prove they are entitled to the said figure. Therefore the first issue is a non-starter.

[39] The second issue is relevant to be considered. Order 20 r. 9 of the Rules of the High Court 1980 states failure to amend pleadings within 14 days after the order granting the amendment, the order shall cease to have effect. In this case, the defendant did not file a re-amended defence and counter-claim within

- A 14 days after my order. The word used under O. 20 r. 9 is “shall cease to have effect”. The word “shall” signify no option. When defendant failed to comply with O. 20 r. 9, the effect must be the leave to amend had ceased effect after the lapse of 14 days from the date of the order. This means, the amount RM21,040,518.31
- B originally claimed by the defendant remained unchanged.

[40] The third issue is the most relevant and it had to be considered together with cl. 5.1.1 and 5.1.2 of the marketing agreement.

- C Clause 5.1.1 reads:

The Company hereby agrees with the Marketing Agent to pay to the Marketing Agent a Marketing Fee computed at 40% of the Membership Fees paid by purchasers of Memberships of the Swiss-Garden International Vacation Club. In the event the Membership Fees are paid by instalments, a sum equivalent to 60% of the Membership Fees will be paid by the Company to the Marketing Agent towards payment of Marketing Fees as and when payment for Membership Fees are received from Purchasers of Membership until the full Marketing Fee is paid to the Marketing Agent.

- E Clause 5.1.2 reads:

The Marketing Fee shall be paid monthly in arrears to the Marketing Agent on or before the 15th day of the following month in respect of sale of Memberships for which payment has been received by the Company and for which the Cooling-Off Period as defined in the Trust Deed has expired and no notice of termination has been received by the Company.

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- G [41] Reading both clauses, it is obvious that the defendant is entitled to 40% of the membership fees in cases where purchasers paid by cash and 60% in cases where payment for membership fees were made in instalments. In either circumstances, payment of fees is subject to plaintiff having received payment from the purchasers. This is clear from the word “paid by purchasers”,
- H “when payment for membership fees are received” and “payment has been received by the company”. In other words, if there is no payment received from any particular purchaser, the defendant would not be entitled to marketing fees. Therefore it is important for the defendant to show that not only were they the ones who brought in the customers, but also that the customers had made their payments.
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[42] Based on those clauses, the plaintiff submits that the defendant cannot rely on “Gross Membership Sales” because it does not reflect the membership sold by the defendant. Whether the stand taken by the plaintiff is correct or not, the parties had dealt with marketing fees since 2001 without any problems. I am perfectly sure that the parties fully understand the formula for the calculation of marketing fees. Taking into account the amount claimed, voluminous documents, accounting process involved and to be fair to both parties, I make an order that a qualified accountant be appointed to calculate the actual marketing fees due and owing to the defendant which remain unpaid from May 2005 till the date of the termination in accordance to cl. 5.1.1 and 5.1.2.

[43] The rest of the items counter-claimed by the defendant were not proven and I disallowed the same.

[44] For the aforesaid reasons, I found the plaintiff has proved their claim on the balance of probability. I therefore allowed the plaintiff's claim as prayed for in prayer 19(a), (b), (d) & (e) of the amended statement of claim. For the same reasons, I allowed the defendant's counter-claim with costs only for prayer 31(2) of the amended statement of defence. The sum ordered to be paid by the plaintiff to the defendant to be set off against the plaintiff's claim for damages.

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